STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

THE GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT, and THE POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT,

Plaintiffs,

vs.

KEVYN D. ORR, in his official capacity as the EMERGENCY MANAGER OF THE CITY OF DETROIT, and RICHARD SNYDER, in his official capacity as the GOVERNOR OF THE STATE OF MICHIGAN,

Defendants.

Case No. 13-768-CZ
Hon. _____

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INGHAM COUNTY CLERK

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BRIEF IN SUPPORT OF PLAINTIFFS' EMERGENCY EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION TO ENJOIN DEFENDANTS FROM INITIATING CHAPTER 9 BANKRUPTCY PROCEEDINGS FOR THE CITY OF DETROIT

Except as provided below, for their Brief in Support of their Emergency Ex Parte Motion for Temporary Restraining Order and Preliminary Injunction to Enjoin Defendants from Initiating Chapter 9 Bankruptcy Proceedings for the City of Detroit, Plaintiffs, the General Retirement System of the City of Detroit ("GRS"), and the Police and Fire Retirement System of

the City of Detroit ("PFRS") (together, the "Retirement Systems"), rely upon and incorporate herein the facts, law, and argument set forth in their Motion.

A. The Local Financial Stability and Choice Act does not permit the Governor to approve or the Emergency Financial Manager to proceed with a Chapter 9 bankruptcy, to the extent that such a bankruptcy would impair or diminish accrued financial benefits of the Plaintiffs.

"[T]he plain provisions of the Constitution are paramount …." *Twp of Dearborn v Dearborn Twp Clerk*, 334 Mich 673, 688; 55 NW2d 201 (Mich 1952). The proposition that the "Michigan Constitution is a limitation on the plenary power of government" is one "so basic as to require no citation …." *Smith v Michigan*, 428 Mich 540, 640; 410 NW2d 749 (Mich 1987) (J Boyle, dissenting). It "is the fundamental law to which all other laws must conform." *Id.* Indeed, officers of all branches of government are required to take an oath that they will uphold it:

> All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe to the following oath or affirmation: ***I do solemnly swear that I will support the Constitution*** of the United States and ***of this state***, and that I will faithfully discharge the duties of the office of …according to the best of my ability. [M.C.L.S. Const. Art. XI, § 1.]

This paramount source of law is most properly enforced by the judiciary through the use of declaratory judgments. Michigan courts have "authority to issue a declaratory judgment against the Governor," and others, to ensure that the Constitution is indeed upheld. *Duncan v. Michigan*, 284 Mich App 246, 273; 774 NW2d 89 (Mich Ct App 2009) (citing *Straus v Governor*, 459 Mich 526; 592 NW2d 53 (Mich 1999)). See also *Sharp v City of Lansing*, 464 Mich 792, 810-811; 629 NW2d 873 (Mich 2001) ("the power of judicial review does not extend only to invalidating unconstitutional statutes or other legislative enactments, but also to ***declaring other governmental action invalid if it violates the state or federal constitution***").

Courts generally believe that a declaratory judgment will suffice to correct unconstitutional action, as all state officers have taken the above-quoted oath to uphold the Constitution. *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (Mich 1999). Where, however, a declaratory judgment proves insufficient, the Michigan Supreme Court has made clear that courts may use other forms of relief to ensure that the Constitution's provisions are not violated. See, eg, *Kosa v. State Treasurer*, 408 Mich 356, 371, 383; 292 NW2d 452 (Mich 1980) ("this opinion indicates the courts can and will issue mandamus to enforce rights conferred by the 1963 Constitution").

Pursuant to Article IX, § 24 of the Michigan Constitution, "[t]he accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof ***which shall not be diminished or impaired*** thereby." (Emphasis added.) An "accrued financial benefit" is "the right to receive certain pension payments upon retirement." *Kosa*, 408 Mich 356 at 371. This right must "not be diminished by the employing unit after the service has been performed." *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich 659, 663 (Mich 1973). Action that does diminish this right is in violation of a "***a solemn***" obligation "between public employees and [their employer] ***guaranteeing that pension benefit payments cannot be constitutionally impaired***." *Kosa*, 408 Mich at 382. Michigan Courts are empowered to enforce this solemn, Constitutional obligation *via* declaratory and other relief. See, eg, *Kosa*, 408 Mich at 383 (with respect to Art. IX, § 24 and "[a]s regards the Executive, this opinion indicates the courts can and will issue mandamus to enforce rights conferred by the 1963 Constitution"); *Murphy v Wayne County Employees Retirement Board of Trustees*, 35 Mich App 480; 192 NW2d 568 (Mich Ct App 1971) (summarily granting judgment in favor of plaintiff on his request for specific relief in the form of reinstatement of his retirement benefits which were "unconstitutionally impaired and

diminished"); *Tinsman v City of Southfield*, 1999 Mich. App. Lexis 2112 (Mich Ct App Dec 3, 1999) (granting summary disposition in favor of plaintiff retirees on their claim that defendant city violated Art. IX § 24 by depriving them of previously earned retirement benefits).

The Michigan Supreme Court has defined the terms "impairment" and "diminishment" for purposes of Art. IX, § 24, utilizing the two following rules of constitutional construction:

> First, the interpretation given the constitution should be the sense most obvious to the common understanding; the one which reasonable minds, the great mass of people themselves, would give it. Secondly, the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished must be considered. [*Dodak v Governor*, 195 Mich App 376, 387; 491 NW2d 832 (Mich Ct App 1992) (quoting *Soap & Detergent Ass'n v Natural Res Comm*, 415 Mich 728; 330 NW2d 346 (Mich 1982)) (internal quotations omitted).]

Applying the first rule of construction, the Court has explained that the common understanding of the words "diminish or impair" is to "reduce." "While a legislative body may increase pension benefits, ***it may not reduce the benefits*** with respect to those individuals who have accrued rights under the pension plan …." *Tinsman*, 1999 Mich App Lexis 2112 at *10 (emphasis added). See also *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 370; 806 NW2d 683 (Mich 2011) (J Hathaway, dissenting) ("Diminish' is defined as 'to make, or make seem, smaller, reduce in size, degree, importance, etc.; … to lessen; decrease.' 'Impair' is defined as 'to make worse, less, weaker, etc.; damage; reduce'") (internal citations omitted).

And applying the second rule of constitutional construction, the Court has recognized that it was the intention of the drafters of Michigan's Constitution to obviate the view that pensions granted by public authorities were only gratuitous allowances that could be revoked at will by a public employer. See *Advisory Opinion*, 389 Mich at 662. Art. IX, § 24 was designed to provide

retirees with financial security following years of public service while employed by a public authority. *Id.* The Michigan Supreme Court has cited the following statement from the record of Michigan's 1961 Constitutional Convention on multiple occasions when explaining this intention:

> ***[T]his proposal by the committee is designed to do 2 things: first, to give to the employees participating in these plans a security which they do not now enjoy, by making the accrued financial benefits of the plans contractual rights.*** This, you might think, would go without saying, but several judicial determinations have been made to the effect that participants in pension plans for public employees have no vested interest in the benefits which they believe they have earned; that the municipalities and the state authorities which provide these plans provide them as a gratuity, and therefore it is within the province of the municipality or the other public employer to terminate the plan at will without regard to the benefits which have been, in the judgment of the employees, earned.
>
> Now, it is the belief of the committee that the benefits of pension plans are in a sense deferred compensation for work performed. And with respect to work performed, ***it is the opinion of the committee that the public employee should have a contractual right to benefits of the pension plan, which should not be diminished by the employing unit after the service has been performed.*** [*Id.* at 663; see also *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 311-312; 806 NW2d 683 (Mich 2011); *Kosa*, 408 Mich at 365 (explaining that Art. IX, § 24 was adopted to combat situations in which pensioners had accumulated years of service for which insufficient money had been set aside in the pension reserve to pay the benefits to which their years of service entitled them).]

Simply put, because the paramount law of this State requires that neither the governor, the legislature, nor any other state officer take action that would reduce, lessen, or otherwise damage the financial security of retirees in their accrued financial benefits, any state action that does diminish or impair such benefits is in violation of Art. IX, § 24.

Pursuant to MCL 141.1558(1), a governor and emergency manager may respectively approve and recommend and petition for a municipal Chapter 9 bankruptcy as follows:

> If, in the judgment of the emergency manager, no reasonable alternative to rectifying the financial emergency of the local government which is in receivership exists, then the emergency manager may recommend to the governor and the state treasurer that the local government be authorized to proceed under chapter 9. If the governor approves the recommendation, the governor shall inform the state treasurer and the emergency manager in writing of the decision .... The governor may place contingencies on a local government in order to proceed under chapter 9. Upon receipt of the written approval, the emergency manager is authorized to proceed under Chapter 9.

But Michigan law requires that this statutory provision be interpreted in such a way that it is not in violation of the Michigan Constitution, if at all possible. "Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Request for Advisory Opinion*, 490 Mich at 307 (quoting *Taylor v Smithkline Beecham Corp*, 468 Mich 1; 658 NW2d 127 (Mich 2003)). "Every reasonable presumption or intendment must be indulged in favor of the validity of an act and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity." *Id.* (quoting *Phillips v Mirac, Inc*, 470 Mich 415; 685 NW2d 174 (2004)). Because, as described *supra*, Art. IX, § 24 prohibits the impairment or diminishment of accrued financial benefits, under the rules of statutory construction, MCL 141.1558(1) must be read as permitting a municipal bankruptcy ***only to the extent that accrued financial benefits are not diminished or impaired.***

Such a reading of MCL 141.1158(1) is consistent with other provisions of the Local Financial Stability and Choice Act. It is clear that Michigan's legislators never intended that the governor or an emergency financial manager take action in violation of Art. IX, § 24. Indeed, MCL 141.1552(m)(ii) expressly provides that "***[t]he emergency manager shall fully comply with ... section 24 of article IX of the state constitution of 1963.***" (Emphasis added.) And

MCL 38.1683 provides that *"[t]he right of* a member or retirant o*f a retirement system to a retirement benefit shall not be subject to* execution, garnishment, attachment, *the operation of bankruptcy or insolvency laws*, or other process of law and shall be unassignable." (Emphasis added.) Further, MCL 141.1558(1) itself contemplates that the governor may "place contingencies on a local government in order to proceed under chapter 9." In light of these statutory provisions and the clear directive of relevant decisional law, there can be ne no question that under MCl 141.1558(1), the governor may authorize and the emergency financial manger may petition for a chapter 9 municipal bankruptcy only to the extent that such action does not impair or diminish accrued financial benefits.

B. If MCL 141.1558(1) does permit a municipal bankruptcy in which accrued financial benefits are subject to impairment or diminishment, then MCL 141.1558(1) is unconstitutional and of no force or effect.

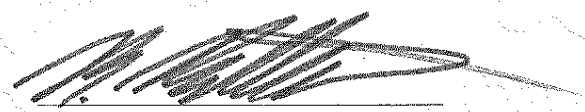
Plaintiffs maintain that the proper interpretation of MCL 141.1558(1) is one which reads it as permitting a municipal bankruptcy only to the extent that such bankruptcy does not lead to the impairment or diminishment of accrued financial benefits. But if this Court decides that it cannot read MCL 141.1558(1) as permitting a municipal bankruptcy only subject to this contingency, then this Court must enter a declaratory judgment finding MCL 141.1558(1) unconstitutional on its face and of no force or effect. *Kosa*, 408 Mich at 382 (recognizing that declaratory relief is proper in the event that a statute is irreconcilable with the prohibition of Art. IX, § 24).

For the reasons described *supra*, any state action that leads to the impairment or diminishment of accrued financial benefits is clearly in violation of Art. IX, § 24. Additionally, Article I, § 10 of the Michigan Constitution provides that "*No* bill of attainder, ex post facto law or *law impairing the obligation of contract shall be enacted*." (Emphasis added.) As stated in

the Michigan Constitution itself, accrued financial benefits are contractual obligations. If MCL 141.1158(1) is read to permit their impairment, then this statute is not only in violation of Art. IX, § 24, but also of Art. I, § 10. Thus, if this Court is unable to reconcile MCL 141.1558(1) with Art. IX, § 24, a declaratory judgment finding MCL 141.1558(1) unconstitutional must issue.

Respectfully submitted,

CLARK HILL PLC

By: 

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